Supreme Court U.S.
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No. 02-706

In the

Supreme Court of the United States

BRIAN DALMER,

Petitioner,

v.

LAMOILLE FAMILY CENTER and DAVID CONNOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a private human services agency offering mediation and case management services to teenagers and their families is susceptible to liability under 42 U.S.C. § 1983.

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The opinion of the Vermont Supreme Court is not yet officially reported, but is reprinted in the Petitioner's Appendix ("Pet.App.") at 1. The opinion of the Lamoille Superior Court is not reported; it is reprinted in Pet.App. at 27.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 2104.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983 are reprinted in Petitioner's Petition at pp. 1-2.

2. Title 33, Section 5502(a)(10) of Vermont Statutes Annotated provides:

> **Definitions and provisions of general application.**
>
> (a) As used in this chapter, unless the context otherwise requires:
>
> (10) "Legal custody" means the legal status created by order of the juvenile court under the authority of this chapter which invests in a party to a proceeding under this

> chapter or another person, which party or person may also be the guardian of the person of the minor, the right to have the physical possession of a minor and to determine where and with whom he shall live, the authority to consent to major medical, psychiatric, and surgical treatment, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to the powers, rights, duties and responsibilities of the guardian of the person of the minor and subject to any residual parental rights and responsibilities.

3. Title 33, Section 5511 of Vermont Statutes Annotated provides:

> **Release, shelter or delivery to court.**
>
> (a) The person taking a child alleged to be a delinquent child or a child in need of care or supervision into custody shall immediately and without first taking the child elsewhere:
>
> > (1) Release the child to his or her parents, guardian or custodian; or
> > (2) Deliver the child to the juvenile court and immediately file written notice thereof with the court, together with a statement of the

reason for taking the child into custody.

(b) In the event that a law enforcement officer has reasonable grounds to believe that a child has run away from his or her parents, foster parents, guardian, legal custodian, parent lawfully exercising parent-child contact, or other person having legal or physical responsibility for the child, the law enforcement officer shall take and deliver the child to:

(1) his or her parents, foster parents, guardian, legal custodian, parent lawfully exercising parent-child contact, or person having legal or physical responsibility for the child; or
(2) any organization designated by the commissioner of social and rehabilitation services as qualified to assist children who have run away for the purpose of reuniting them with their parents, guardian or legal custodian.

4. Title 33, Section 5512(a) of Vermont Statutes Annotated provides:

Designated shelter.

(a) The commissioner of social and rehabilitation services shall designate shelters throughout the state where a child taken into custody pursuant to section

5510(4) of this title may be housed for a period not to exceed 7 days.

(b) Upon delivery of a child to a designated shelter program, the shelter program director or his or her designee, shall:

(1) notify the child's parents, guardian or custodian that the child has been taken into custody; and
(2) make reasonable efforts to mediate the differences between the parties.

(c) Upon expiration of the period referred to in subsection (a) of this section or at the request of the child or the parents:

(1) the child shall be released to his or her parents, guardian or custodian; or
(2) a law enforcement officer shall deliver the child to the juvenile court pursuant to section 5511(2) of this title.

(d) During the period of time the child is at the shelter, the legal custody of the child shall remain with the parent, unless otherwise designated by the juvenile court.

5. Title 33, Section 5510 of Vermont Statutes Annotated provides:

Taking into custody.

A child may be taken into custody:

(1) Pursuant to the laws of arrest of this state,
(2) Pursuant to an order of the juvenile court under the provisions of this chapter,
(3) By a law enforcement officer when the officer has reasonable grounds to believe that the child is in immediate danger from his or her surroundings, and that removal is necessary for the child's protection,
(4) By a law enforcement officer when the officer has reasonable grounds to believe that the child has run away from his or her parents, foster parents, guardian, legal custodian, parent lawfully exercising parent-child contact, or other person having legal or physical responsibility for the child.

STATEMENT OF THE CASE

Respondent David Connor is director of a program called the Lamoille Inter-agency Network for Kids ("LINK"), which is operated by the Respondent Lamoille Family Center (hereinafter "LFC"). LFC is a non-profit parent-child center located in Morrisville, Vermont. The LINK program was conceived from a

collaboration of human service agencies and educational agencies in the Lamoille Valley region of Vermont around 1989, in order to meet the needs of teenagers with problems at home or in school. The LINK program offers mediation and case management services to teenagers and their families. LINK also offers a shelter program for teenagers who are either thrown out of their homes or who voluntarily run away from home.

The LINK program was designed to try every reasonable avenue to resolve teenagers' family issues, keep teenagers at home, and provide services for families so children can avoid State custody. Indeed, the single most important element of the LINK program is forestalling State custody of children. The ultimate goal of the LINK program is to reunite families. Prior to the creation of the LINK program, runaways would either be on the street, or in the care of the Department of Social and Rehabilitation Services (hereinafter "SRS"). LINK was designed to provide an alternative.

LFC, among its other services, contracted with SRS–as an independent contractor–to provide counseling and mediation services, and also, if necessary, shelter to unmanageable youths and runaways. Shelter services are limited to a period of two weeks. The purpose of the shelter home is twofold. First, it provides for a cooling-off period. Second, the families are afforded an opportunity to resolve whatever difficulties they are having. Entry into a LINK shelter is voluntary, and the child always has the choice whether to enter the program. When a child is in the LINK program, the parents retain legal custody.

It is SRS policy initially to refer a runaway to LINK. Once a child is referred to LINK, SRS only

becomes re-involved if efforts by LINK are fruitless. SRS has estimated that LINK is successful in resolving family conflict nearly 96% of the time. As a result of LINK's successes, the Lamoille County district now has the lowest number of unmanageable children in custody in the State of Vermont.

In addition to referrals from SRS, LFC and LINK receive referrals directly from schools, from parents, from individual youths, from mental health programs, and other agencies dealing with children who might benefit from LINK's programs and services.

On December 26, 1993, Jeremy Dalmer–age 15 at the time–left his home in Elmore, Vermont, without his parents' permission. Jeremy had apparently clashed with his father, Petitioner Brian Dalmer, over teenage issues such as snowboarding, television, and curfews. Jeremy rode his bicycle nearly 45 miles through slush on a cold evening to stay with his friends, the Stewarts, in Plainfield, Vermont. Jeremy voluntarily and individually made the decision to go to the Stewarts' home. He received no assistance from, nor had he ever heard of, David Connor or the Lamoille Family Center at that time. Indeed, Petitioner testified that he had no evidence or personal knowledge that would indicate that David Connor or the Lamoille Family Center encouraged Jeremy Dalmer to run away from home on December 26, 1993.

On or about December 27, 1993, Mrs. Stewart called the youth services agency in a neighboring county to ask what she should do about Jeremy. They gave her the number of SRS, and told her that Jeremy should contact SRS. Mrs. Stewart was not comfortable with Jeremy staying at her house without his parents' permission. Therefore, on or about December 27, 1993,

Jeremy left the Stewarts' residence–voluntarily and without any assistance from defendants–and went to the Fisk residence in Marshfield, Vermont.

The following day, on or about December 28, 1993, Jeremy made his initial contact with SRS to notify them that he had run away from home. An SRS worker referred Jeremy Dalmer's case to David Connor, director of LINK, on December 29, 1993, three days after Jeremy ran away. Prior to the referral from SRS, neither David Connor nor LFC had any contact with Jeremy Dalmer. It was while Jeremy was at the Fisk residence that Mr. Connor first contacted him.

On December 29, 1993, David Connor informed Brian Dalmer that his son had been found. Mr. Connor did not tell Mr. Dalmer where Jeremy was staying for two reasons. First, Jeremy had requested that he not do so. Second, Mr. Connor wanted to avoid the potentially dangerous situation where parents show up and forcibly remove their child.

Mr. Connor felt it was imperative to reunite the family as quickly as possible because school was starting the following Monday. Mr. Connor obtained a history of the family problems Jeremy was having from both Jeremy and Mr. Dalmer. Although Mr. Dalmer regularly insisted that he wanted Jeremy to return home, Mr. Connor did not forcibly try to return Jeremy because Jeremy made it very clear that if he were forced to go home, he would simply run away again.

Jeremy voluntarily stayed at the Fisk residence from December 29, 1993 until January 6, 1994, and steadfastly refused to go home. David Connor drove Jeremy to and from school so that Jeremy could continue to attend People's Academy while staying at

the Fisk residence, and in the hopes of trying to break Jeremy's interest in the Marshfield area and reuniting Jeremy with his family. Jeremy testified that he was pleased Mr. Connor drove him to and from school while he was staying at the Fisks' residence. On these trips, Mr. Connor and Jeremy discussed what Jeremy needed and wanted in order to reconcile with his family. During this time, Jeremy chose to stay with the Fisks rather than return home. David Connor regularly encouraged Jeremy to return home.

On January 6, 1994, Mr. Connor explained to Jeremy that if he were unable to work things out at home, he would likely be placed in SRS custody. Mr. Connor also informed Jeremy that he would no longer be able to take Jeremy to People's Academy from the Fisks' home. Nonetheless, despite David Connor's efforts to reunite the family, Jeremy decided that he would rather enter the LINK shelter program than return home. On January 6, 1994, Jeremy, by his own choice, voluntarily entered the LINK shelter program and stayed at the Stones' residence in Morrisville, Vermont.

Jeremy was treated well while staying at the Stones' residence, and he testified to enjoying the time he spent there. Although he was staying in a shelter as part of the LINK program, Jeremy's parents maintained legal custody of him. While Jeremy was staying with the Stones, Mr. Connor encouraged Jeremy to have face-to-face contact with his parents in an effort to resolve their problems. Mr. Dalmer visited with Jeremy and had conversations with him on the phone. However, Mr. Dalmer refused to go to LFC to meet with David Connor in an attempt to mediate family problems. Mr. Dalmer testified that he had no interest in the mediation or dispute resolution services that LFC could provide. Jeremy, however, continued to refuse to go home.

Pursuant to LFC's contract with SRS, Jeremy could only stay with the Stones for a two-week period. On January 20, 1994, Mr. Connor told Jeremy that the two-week period that he could keep him in a shelter home under the LINK contract with SRS had expired. Mr. Connor told Jeremy that he could either go home; call his family to work out some agreement with them; or turn himself in to the police. Mr. Connor told Jeremy that if he did not exercise one of those three options, he would be considered a runaway and would be picked up by police. On January 20, 1994, Mr. Connor also informed the Dalmers that LFC's involvement had ended.

Jeremy continued to refuse to go home and instead went to the Misicks' residence in Marshfield. On January 21, 1994, the police picked up Jeremy at the Misicks' and returned him home to his parents. Jeremy testified that he was not happy when the police forcibly returned him to his father's home. The next day, Jeremy ran away again. He ran away from home again in May, 1994, and a fourth time on November 30, 1994. Finally, in an attempt to go to his prom, Jeremy ran away yet again on May 19, 1995.

Following each of Jeremy's run-aways, a hearing was conducted to determine who should have custody of Jeremy. At the first court hearing, on January 24, 1994, Jeremy told the court that he did not feel safe in his parents' home. Judge Cook determined that reasonable efforts were made to have Jeremy return home, but that he believed Jeremy would not stay home and, thus, placed him in temporary custody with SRS. Judge Cook concluded that the only way to keep Jeremy at home would be to chain him to a bed. Similarly, after Jeremy ran away in May, 1994, Jeremy was asked by the Judge if he would go home and stay home, and Jeremy

replied "no." Therefore, Judge Cook felt it would be irresponsible of him to return Jeremy home, so Jeremy was once again placed in SRS custody. Finally, at a juvenile disposition hearing in March, 1995, Jeremy was asked if he thought his problems with running away from home stemmed from his exposure to influences such as the defendants. Jeremy, under oath, replied "no," because:

> [N]o matter who influences me in any way, I'll be influenced that way no matter where I am, whether it's even in a newspaper article or something. And, also, they haven't influenced me. No one has ever said: Don't go home. They have just like told me the facts: That we need counseling. And no one has ever told me not to let me go home. In fact, they have all kind of encouraged it because that would be the final goal.

Similarly, at the juvenile detention hearings Mr. Dalmer testified that the fundamental reasons Jeremy ran away from home had to do with involvement with drugs, incorrigible behavior, and sexual relations with girls.

On January 9, 1996 Petitioner filed an Amended Complaint in the Lamoille Superior Court against, *inter alia*, Defendants David Connor and LFC. Mr. Dalmer maintained that respondents deprived him of his fundamental liberty interest in family integrity. On August 15, 1997, the trial court granted summary judgment to defendants on this claim. The Vermont Supreme Court affirmed on August 15, 2002.

REASONS FOR DENYING THE WRIT

There is no compelling reason for the Court to review the decision of the Vermont Supreme Court in this case. The trial court properly dismissed, and the Vermont Supreme Court properly affirmed dismissal of Brian Dalmer's civil rights claim. Neither David Connor nor the Lamoille Family Center could have violated Plaintiff's right to family integrity because (a) they never took custody of Jeremy Dalmer; (b) they are not state actors as required by 42 U.S.C. § 1983; and (c) even if there were a constitutional right of family integrity under these circumstances, the respondents would be protected from a section 1983 claim by qualified immunity.[1]

A. David Connor and LFC Never Had Custody of Jeremy

In order for Petitioner Brian Dalmer successfully to assert that his constitutional right to family integrity was violated, he must show that David Connor and LFC had custody of Jeremy. See *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005 (1989), cited in *Billado v. Appel*, 165 Vt. 482, 491-92 (1996). The Vermont Supreme Court noted in this case that "[p]laintiffs [Brian and Jeremy Dalmer]

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[1] The Vermont Supreme Court affirmed on the grounds that the case was indistinguishable from the claim made in *Billado v. Appel*, 165 Vt. 482 (1996), and that no constitutional right of family integrity existed under the circumstances. Pet.App. at 21-22. The Vermont Supreme Court further determined that even if a constitutional right to family integrity were to be recognized under the circumstances, the respondents could not have violated that right as Jeremy was never in the custody of David Connor or LFC. Pet.App. at 21-22. The Vermont Supreme Court also determined that Petitioner waived the argument that Mr. Connor and LFC were state actors, as it was not raised at trial. Pet.App, at 22.

admit that a necessary element of their claim is that defendants took custody of Jeremy." Pet.App. at 22. The critical holding in this case, therefore, is the finding that "as a matter of law, plaintiffs failed to show such custody at trial." Pet.App. at 22.

The Vermont Supreme Court reviewed the relevant provisions of the Vermont Juvenile Proceedings Act, 33 V.S.A. § 5501, et seq., and affirmed that, as a matter of law, Mr. Dalmer did not prove that either David Connor or LFC ever had custody of Jeremy. Jeremy ran away from home in Decemeber, 1993 and stayed with friends for over one week before he chose to enter the LINK shelter program. He was never arrested, and there was no juvenile order issued regarding his custody at the time. Nor was he picked up by a law enforcement officer until after he had stayed in the shelter the maximum 14 days allowed by the SRS contract with LINK. Consequently, Jeremy was not in the custody of the defendants as defined in the Juvenile Proceedings Act.

B. David Connor and LFC were not "State Actors"

The Vermont Supreme Court held that petitioner waived the argument that respondents Connor and LFC were not entitled to qualified immunity on the section 1983 claims. Even if there were no waiver, however, petitioner's claim fails for the more fundamental reason that Connor and LFC were not acting "under color of state law."

To state a cause of action under 42 U.S.C. § 1983, Brian Dalmer must allege sufficient facts to establish the following two elements: (1) that the defendants were acting under color of state law, and (2) that their

conduct deprived the Plaintiff of rights secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13 (1981). Generally, the protections of section 1983 do not extend to private conduct violating individual rights no matter how abhorrent the conduct may be. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 461-62 (1988). Accordingly, for David Connor and the Lamoille Family Center–private actors–to be subject to section 1983 liability, petitioner must establish that they were the equivalent of "state actors," and thus acting under color of state law.

A three-part test has evolved to determine whether or not a private actor is susceptible to section 1983 liability. First, the "public function" test questions whether the defendants were exercising powers traditionally and exclusively reserved for the government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453-54 (1974), Second, the "state compulsion" test questions whether the state is exercising such "coercive power" or "significant encouragement, either overt or covert," that the defendants' actions must be deemed to be that of the state. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166, 98 S.Ct. 1729, 1738-39 (1978). And third, the "nexus" test, questions whether there is a sufficiently close nexus between the government and the challenged private action that it may fairly be treated as that of the government. *Jackson*, 419 U.S. at 351. David Connor and the Lamoille Family Center do not fulfill any of these criteria.

First, it cannot be said that permitting unmanageable children to stay in shelters is a power exclusively reserved for the state. Several courts have held that the care of foster children, or the placing of

displaced children in foster care, is not traditionally the exclusive prerogative of the State. *See, e.g., Murphy v. Morgan*, 855 F.Supp 943, 947 (N.D.Ill. 1994) (holding that the mere placement of displaced children in a group facility does not convert the owner of that facility into a state actor); *Lintz v. Skipski*, 807 F.Supp 1299, 1306 (W.D.Mich. 1992) ("The care of foster children is not a power which has been exclusively reserved for the state."); *Walker v. Johnson*, 891 F.Supp. 1040, 1050 (M.D.Pa. 1995) (same); *Albert v. Dane County*, 542 N.W. 777, 789 (Ct.App.Wis. 1995) (same); *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th. Cir. 1989) (same); but see *Donlan v. Ridge*, 58 F.Supp.2d 604, 610 (E.D.Pa. 1999) (holding that *forcible removal* of child from his home by foster care agency was exclusively prerogative of the state).

The State of Vermont is not vested with exclusive responsibility for sheltering unmanageable children under the Juvenile Proceedings Act, 33 V.S.A. § 5501, *et seq.* The juvenile court may grant legal custody to SRS, but it also has the authority to grant legal custody of unmanageable children to other agencies and private actors. 33 V.S.A. § 5502(10). SRS is only one of the potential legal custodians. Thus, the State of Vermont does not have exclusive right to take custody of minors, who are determined to be unmanageable, in shelters or foster homes. Close relatives, private organizations, and other suitable individuals may serve as well. Therefore, David Connor and Lamoille Family Center were not performing traditionally exclusive state functions.

The second prong of the "state actor" test similarly doesn't apply. There is no evidence, nor does Brian Dalmer allege, that the state exercised any coercive power over David Connor and the Lamoille Family Center. The day-to-day decision-making of the

Center was left to David Connor and LFC's employees. *See Lintz*, 807 F.Supp. at 1305. Other than making initial referrals and receiving progress reports, the state has minimal interaction with the LINK program. Therefore, Defendants were not, at any time, subject to the coercive power of the state.

Finally, Brain Dalmer argues that he has presented facts demonstrating a sufficient "nexus" between the state and defendants, given the contractual undertaking by the Lamoille Family Center to run the LINK shelter program. Although the Lamoille Family Center did sign a contract with SRS, that fact alone is not sufficient to convert a private party into a state actor. *Pfoltzer v. County of Fairfax*, 775 F.Supp. 874, 891 (E.D.Va. 1991). Nor is the fact that the LINK program receives its funding from the state proof that it is a state actor. *Blum v. Yaretsky*, 457 U.S. 991, 1011, 102 S.Ct. 2777, 2789 (1982). The Lamoille Family Center is a non-profit parent-child center which entered into a contract with the state to provide placement in shelters for unmanageable children. As noted, *supra*, the placement of children in shelters is not an exclusive function of the state. Therefore, David Connor and LFC cannot be categorized as "state actors," and could not have violated any of Brian Dalmer's constitutionally-protected rights.

C. There is No Controlling Constitutional Right of Family Integrity under these Circumstances

The Vermont Supreme Court has not, as petitioner suggests, held that there is no controlling constitutional right of family integrity. The court has held that in certain circumstances, "the [claimed] right is so amorphous and conditional that no worker could

know that his or her actions were in violation of that right." *Billado v. Appel*, 165 Vt. 482 (1996). In the present case, the Vermont Supreme Court determined that "[Petitioner's] substantive claim is indistinguishable from that made in *Billado*." Petitioner apparently alleges that he was deprived of the custody of his son by defendants without his permission, but the Vermont Supreme Court found as a matter of fact and law that neither LFC nor Connor took custody of Jeremy Dalmer.

Petitioner's reliance on *Wilkinson v. Russell*, 182 F.3d 89 (2d Cir. 1999) is misplaced. *Wilkinson* acknowledged the Vermont Supreme Court's view that "although the constitution extends certain rights pertaining to the family, precedent has not delineated the exact parameters of those rights and case workers have therefore seldom had a basis for concluding that their actions were unconstitutional." *Id.* at p. 104, n.8. The Vermont Supreme Court has not refused to recognize the right to family integrity; rather, the *Billado* case held that it does not apply to circumstances similar to those in the present case.[2] The Second Circuit opinion in *Wilkinson* does not suggest a different result.

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[2] Indeed, the Vermont Supreme Court expressly recognized the constitutional right to family integrity 25 years ago. *See In re N.H.*, 135 Vt. 230, 236 (1977) ("[T]he freedom of children and parent to relate to one another in the context of the family, free of governmental interference, is a basic liberty long established in our constitutional law").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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